

THIS DISPOSITION IS NOT
CITABLE AS PRECEDENT OF THE TTAB 6/2/98

U.S. DEPARTMENT OF COMMERCE
PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re H. E. Butt Grocery Company

Serial No. 74/575,074

W. Ronald Robins of Vinson & Elkins for applicant.

Nicholas K. D. Altree, Trademark Examining Attorney, Law
Office 109 (Deborah Cohn, Managing Attorney).

Before Simms, Cissel and Walters, Administrative Trademark
Judges.

Opinion by Walters, Administrative Trademark Judge:

H.E. Butt Grocery Company has filed a trademark
application to register the mark shown below for "carbonated
non-alcoholic soft drinks."¹

¹ Serial No. 74/575,074, in International Class 32, filed September 19, 1994, based on an allegation of a bona fide intention to use the mark in commerce. On July 7, 1995, during the prosecution of this application, applicant filed an amendment to allege use, alleging a date of first use and first use in commerce as early as December, 1994.

The mark appears on the specimens submitted with the amendment to allege use on cans of soft drink featured in an advertisement, as follows:

The Trademark Examining Attorney held the mark unregistrable under Section 2(e)(1) of the Trademark Act, 15 U.S.C. 1052(e)(1), on the ground that a portion of applicant's mark, OUR OWN ORIGINAL, is merely descriptive in connection with its goods, and finally required, under Section 6 of the Trademark Act, 15 U.S.C. 1056, a disclaimer of OUR OWN ORIGINAL apart from the mark as a whole.

Applicant has appealed. Both applicant and the Examining Attorney have filed briefs, but an oral hearing was not requested. We affirm the refusal to register.

The Examining Attorney contends that, as used by applicant in connection with the identified goods, OUR OWN ORIGINAL is laudatory and, thus, merely descriptive; and that each of the three words comprising the phrase OUR OWN ORIGINAL are common words and that the combination of these

words does not create a unique commercial impression different from the clear and unambiguous meanings of the individual terms. In support of his position, the Examining Attorney has submitted excerpts of articles from the LEXIS/NEXIS database. The Examining Attorney contends that these excerpts demonstrate that the phrase "own original" is often preceded by a pronoun or a proper name, and that, in that context, "own" merely reinforces the pronoun or name.

Conceding that the individual words comprising the phrase OUR OWN ORIGINAL are "common and ordinary words" and that OUR and OWN are "simple words with clear meanings," applicant contends that ORIGINAL is "a complex word with a variety of meanings"; that, therefore, the entire phrase, considered in connection with soft drinks, is suggestive rather than merely descriptive; that the Examining Attorney's LEXIS/NEXIS evidence confirms the vagueness of the phrase; and that there is no evidence of third-party use of the phrase in connection with soft drinks. In support of his contention that OUR OWN ORIGINAL is suggestive, applicant argues that the alliteration of the phrase "creates a distinct and memorable impression which goes beyond any information content"; that the phrase is suggestive of products of a bygone era; and that "the vaguely laudatory and favorable connotations of the word ORIGINAL also lend suggestiveness." Applicant suggests

that, in connection with soft drinks, OUR OWN ORIGINAL could mean either that the product is applicant's first or earliest soft drink; that the flavor is new, novel or inventive; or that the flavor is one which others have copied.

Turning to the issue of whether OUR OWN ORIGINAL is merely descriptive of applicant's goods, we consider whether OUR OWN ORIGINAL immediately conveys information concerning a quality, characteristic, function, ingredient, attribute or feature of applicant's product. *In re Bright-Crest, Ltd.*, 204 USPQ 591 (TTAB 1979); *In re Engineering Systems Corp.*, 2 USPQ2d 1075 (TTAB 1986). We determine this question on the basis of the identification of goods in the application before us. *See, In re Allen Electric and Equipment Co.*, 458 F.2d 1404, 173 USPQ 689 (CCPA 1972); *In re Vehicle Information Network Inc.*, 32 USPQ2d 1377 (TTAB 1994); and *In re Cryomedical Sciences Inc.*, 32 USPQ2d 1377 (TTAB 1994).

While we agree with applicant that the cases cited by the Examining Attorney do not establish a *per se* rule that ORIGINAL is a merely descriptive term, we find the case of *General Foods Corporation v. Ralston Purina Company*, 220 USPQ 990 (TTAB 1984), to be particularly relevant to the case herein. In that case, in determining that ORIGINAL BLEND is merely descriptive as used by applicant in

connection with cat food, the Board stated the following (at 992-994):

[W]e agree with opposer that both [ORIGINAL and BLEND] are highly descriptive of such products. We need no dictionary to aid us in determining that BLEND is a commonly understood term referring to a combination, mixture or amalgam of ingredients and the record is replete with examples of such descriptive use of BLEND for a large variety of food products, including pet foods. The same conclusion can be reached as to ORIGINAL which is generally used to indicate that a product or a particular variety or style of a product is the first-of-its-kind. ORIGINAL is also widely used on food products, including pet food, as this record demonstrates. There is no doubt that one reason for its widespread use is that, in the English language, at least, ORIGINAL has the character of "puffery" rather than constituting a claim of exclusivity, novelty, or absolute priority. Bearing this in mind, we agree with opposer that if a manufacturer wishes to say to purchasers in a plain and simple way that the product, variety or type is the first-of-its-kind, there are not very many words other than ORIGINAL from which to choose.

. . . .
As viewed on the basis of documents in the record, we conclude that the designation ORIGINAL BLEND possesses nothing more than a merely descriptive significance, that of conveying the information to purchasers that the cat food to which it is applied is the first in a line of flavor varieties and the fact that this first-of-its-kind variety is a blend of flavors.

. . . .
We are likewise unpersuaded by applicant's arguments that the unitary expression ORIGINAL BLEND is nebulous in its meaning or that it is incongruous.

In the case of *In re Ervin*, 1 USPQ2d 1665 (TTAB 1986), the Board found THE ORIGINAL to be merely descriptive in connection with game equipment because the terms are common and laudatory. Finding the term ORIGINAL to have a first-

of-its-kind connotation, as in the *General Foods* case, the Board noted (at 1667) that the placement of the phrase "immediately above the product name so that a purchaser would read *The 'Original' Euchre & Game Scorer* seems only to emphasize the descriptive significance of THE 'ORIGINAL'."

Similarly, in the case before us, both the placement of the phrase OUR OWN ORIGINAL immediately above the product name (as shown in the specimen as "OUR OWN ORIGINAL DR. B" and "OUR OWN ORIGINAL COLA") and the advertising copy on the specimen ("*Try the newest taste in Texas. Enjoy six new flavors.*") emphasize the first-of-a-kind descriptive significance of this phrase in connection with the identified goods.² While the word ORIGINAL may have other connotations, there is no support in this record for applicant's proposition that the phrase OUR OWN ORIGINAL suggests these other connotations.³ As applicant admits OUR and OWN are common, ordinary words. We agree with the Examining Attorney that OUR and OWN in the phrase OUR OWN ORIGINAL do not alter the descriptive significance of the term ORIGINAL. Nor does the alliterative quality of the phrase overcome the descriptive significance of the phrase.

² By first-of-a-kind, we mean that the phrase indicates either that these products are new products for applicant and/or that they are newly introduced in the region, as suggested in applicant's advertisement. Both connotations are merely descriptive.

³ We point out that, even if these other connotations of ORIGINAL were applicable herein, these other connotations would also be merely descriptive in connection with the identified goods.

Further, as stated in the *General Foods* case, it is not necessary for the Examining Attorney to establish third-party use of the phrase in connection with the identified goods in order to find the phrase merely descriptive.

In conclusion, we find that OUR OWN ORIGINAL is merely descriptive in connection with carbonated non-alcoholic soft drinks, the goods identified herein.

Decision: The requirement for a disclaimer of OUR OWN ORIGINAL is affirmed. Applicant is allowed until thirty days from the mailing date of this decision to submit a proper disclaimer, failing which registration will be refused. See, Trademark Rule 2.142(g).

R. L. Simms

R. F. Cissel

C. E. Walters
Administrative Trademark Judges,
Trademark Trial and Appeal Board